

1 **BEFORE THE ARIZONA MEDICAL BOARD**

2 In the Matter of

Board Case No. MD-03-0014A

3
4 **ZEV FAINSILBER, M.D.**

**FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER**

5 Holder of License No. **22634**
6 For the Practice of Allopathic Medicine
7 In the State of Arizona.

(Letter of Reprimand)

8 The Arizona Medical Board ("Board") considered this matter at its public meeting on
9 August 9, 2006. Zev Fainsilber, M.D., ("Respondent") appeared before the Board for a formal
10 interview with legal counsel Gordon Lewis pursuant to the authority vested in the Board by A.R.S.
11 § 32-1451(H). The Board voted to issue the following Findings of Fact, Conclusions of Law and
12 Order after due consideration of the facts and law applicable to this matter.

13 **FINDINGS OF FACT**

14 1. The Board is the duly constituted authority for the regulation and control of the
15 practice of allopathic medicine in the State of Arizona.

16 2. Respondent is the holder of License No. 22634 for the practice of allopathic
17 medicine in the State of Arizona.

18 3. The Board initiated case number MD-03-0014A receiving a complaint alleging
19 Respondent inappropriately touched a forty-seven year-old female patient ("FB") during a 2002
20 office visit. FB alleged that after the inappropriate contact Respondent called her at work and
21 asked to see her that evening. In his initial response to the Board in 2003 Respondent denied any
22 inappropriate behavior, denied having made any phone call to FB, and made no mention of a
23 concern about melanoma. In 2005 Respondent's admitted to calling FB at work, but claimed he
24 did so to follow-up with her immediately about the possibility of skin cancer after noting her history
25 of skin cancer. Respondent did not document his phone call to FB. Respondent did not biopsy the
benign moles he noted on FB's legs during his examination. A Board medical consultant reviewed

1 FB's chart and noted it makes only one reference to melanoma. Also, on FB's problem list and list
2 of past surgery, melanoma is the last diagnosis on the list. Respondent added these entries to an
3 undated form, written in his handwriting. FB denies any history of melanoma and her self-
4 disclosed history, written by her, does not mention melanoma and she twice marked "no" on the
5 form in answer to questions about cancer history. On Respondent's 2002 examination form he
6 wrote "various benign appearing moles," "moles on legs/several moles on legs, between breasts
7 – changing colors, wants them checked." Prior to the 2002 appointment there is no mention in
8 FB's record of any issue with moles and other treating physician's records did not mention any
9 issue regarding moles or melanoma.

10 4. The Board initially considered this matter in February 2006 and ordered
11 Respondent to undergo a psychosexual evaluation. The results of the evaluation were
12 inconclusive and the evaluator recommended Respondent use a professional chaperone at all
13 times when treating female patients to both protect himself from future allegations and to possibly
14 protect his patients and randomly ask his patients to complete satisfaction forms. The evaluator
15 also recommended therapy to address behaviors that generated the patient complaint. Board
16 Staff noted nothing in the report should be taken as a statement whether or not Respondent is
17 culpable of misconduct and it appears he has engaged in behaviors causing a patient to file a
18 complaint. The results of the evaluation were reviewed by the Board at its June 2006 and the
19 Board voted to invite Respondent to a formal interview.

20 5. Respondent testified FB presented for the December 2002 examination with a
21 complaint of having moles she wanted Respondent to check that she described as being on her
22 thighs and between her breasts. Respondent stated after the interrogation and going into her
23 chronic medical problems, he left the room and FB was asked to take off her pants and was given
24 a sheet to cover herself. Respondent noted he returned to the room with his medical assistant
25 and FB removed no other articles of clothing. Respondent testified he visually examined FB's

1 thighs, and she showed him the areas of the breasts – the cleavage between the two breasts
2 where she had moles. Respondent testified he never touched FB where she had the moles and
3 after his exam he told her to get dressed and left the room. Respondent noted he returned a few
4 minutes later by himself to talk to the patient about his findings. Respondent testified he never
5 examines a patient without the presence of his medical assistant. Respondent noted he did not
6 review FB's chart to go over her particular problems.

7 6. The Board asked about Respondent's contact with FB after the office visit.
8 Respondent testified when he went to work on FB's chart after the visit he realized the chart
9 documented a history of melanoma and he got concerned, called FB around lunchtime and asked
10 her to return to the office for a repeat examination – a more thorough examination. Respondent
11 noted it was routine for him to call patients himself and patients are able to contact him directly
12 through his cell phone. The Board noted FB's recollection is that Respondent called her at the
13 end of the work day. Respondent did not document the call in FB's chart. The Board also noted
14 Respondent needed to speak with FB urgently, but he did not tell her what the concern was.
15 Respondent testified he thought FB would be more upset discussing the details over the phone.
16 The Board questioned why Respondent would be concerned that FB was upset when he claimed
17 she gave the history of melanoma and would therefore be aware of the issue. Respondent
18 testified he did not want to go into details or a lot of questions and told her to return so they could
19 discuss the details. Respondent denied asked FB if she was okay or if she was going to be off of
20 work the next day. Respondent testified he asked FB if she wanted to return to the office the
21 same day and what time she got off work so he and his staff could be at the office and, if that was
22 not convenient, he would schedule her for the next day.

23 7. Respondent testified he did not inappropriately touch FB or make any sexual
24 innuendos towards her. The Board directed Respondent to FB's medical record and noted his
25 first visit with her was in September 2001 and he saw her approximately eight times up to

1 December 12, 2002. The Board noted Respondent's record, other than the visit at issue, has no
2 mention by either himself or FB of any history of melanoma. The Board asked if during the
3 December 2002 visit FB mentioned she was concerned about melanoma. Respondent testified
4 FB did not. The Board confirmed there was nothing in Respondent's notes about a discussion
5 with FB about the moles being melanomas or possible melanomas. The Board noted Respondent
6 said he "discovered" the issue of melanoma on the chart when he was reviewing FB's chart after
7 the visit and asked if he went all the way back in the chart for issues or did he just compare that
8 visit to the most recent previous visit. Respondent testified he often goes back to the initial visit,
9 but if the Board looked at the bottom of the page it would see he tries to update the sheet
10 according to what is happening and he crosses things out and adds new things – like
11 medications. Respondent testified it was like a "cheat sheet" he uses to keep up to date with
12 whatever is happening with the patient. The Board if Respondent did not find it necessary to date
13 the changes when they occur. Respondent testified he had not been doing so.

14 8. Respondent was unable to recall at what point during the eight visits with FB that
15 she mentioned she had melanoma. The Board asked Respondent why he thought FB would
16 make these allegations against him. Respondent testified he did not know and, prior to this visit,
17 had a good professional relationship with her. The Board asked Respondent the treatment for
18 melanoma. Respondent noted the treatment is surgical resection, investigation of the margins
19 and depth of the melanoma for further resection and treatment and diagnostic imaging and
20 certification, if necessary. The Board noted there was no comment whatsoever in any portion of
21 Respondent's notes, examinations or anywhere else of melanoma, although Respondent did
22 mention other issues such as asthma, hypertension, and neck pain. The Board noted
23 Respondent also noted consultants for many issues, but there is no mention of follow-up
24 treatment or concern about melanoma by either him or FB and asked Respondent if he found this
25 odd. Respondent admitted there was no information in the chart in regard to the problem and he

1 noted when he reviewed charts of other physicians who treated FB he found additional history
2 that FB had not shared with him, such as deep venous thrombosis. Respondent testified he could
3 not give the Board further information regarding the melanoma history and he did not make
4 further notations.

5 9. The Board noted FB's primary care physician had a very complete history and
6 physical examination and a comment under "Family History" of "no family history of melanoma."
7 Respondent acknowledged it was odd that FB would not mention a history of melanoma to
8 anyone but him. The Board noted all of the notes on the visit for December 2002 look like they
9 were made with the same pen except for "melanoma" under "Problem List" and "melanoma"
10 under "Past Surgical History." The Board clarified it was Respondent's practice on visits with his
11 patients to go back to earlier visits in the chart and cross out things that are no longer
12 appropriate, in other words he backdates without actually dating the entry. The Board confirmed
13 Respondent had not been taught this method of recordkeeping either in medical school or
14 residency.

15 10. The Board noted it was concerned with Respondent's credibility and confirmed
16 with Respondent he examined FB's lungs and heart, but not her breasts or the mole or skin lesion
17 between her breasts. Respondent testified he only visually examined the lesions and did not
18 touch them. The Board asked Respondent if he was so impressed by what he saw, without
19 feeling or palpating, that he was compelled to call FB at work and invite her back to the office for
20 another examination and discussion. Respondent testified he was. The Board noted however
21 Respondent was not so impressed that he put something in FB's chart.

22 11. Respondent's specialty is internal medicine and he does not normally treat skin
23 problems at his office, rather he refers patients with suspicious-looking lesions for a
24 dermatological examination or surgical consultation. Respondent normally makes these referrals
25 at the time of the office visit. Since this was his normal practice the Board asked why then did he

1 call FB and not just refer her to another physician. Respondent testified he saw FB in the morning
2 and she had several dark lesions on the thighs that on first impression he thought were fairly
3 benign moles. Respondent noted FB also had some cherry spots in between the breast that were
4 of no concern to him, but when he wrote his note in the chart and realized FB may have a history,
5 he went to his notes of possible melanoma. The Board noted based on Respondent's earlier
6 testimony he would have referred FB to another physician without having her come in.
7 Respondent testified he got concerned about the lesion and wanted to do a more thorough
8 examination and that is why he called FB and asked her to come back in. Respondent noted in
9 the past he used to do a skin biopsy before referring patients and, at that particular time, he did
10 not think he needed to do a biopsy or other examination by himself – other than a physical
11 examination of the skin. Respondent testified he wanted more information and that is why he
12 asked FB to come back.

13 12. Respondent's staff now does all the contact with the patients and he no longer
14 contacts them himself, he continues to have chaperones monitor or accompany him for physical
15 examinations of female patients, and he has taken steps to eliminate the concerns that might
16 have arisen for his telephone contact with patients. Respondent noted he treated FB in a
17 professional and respectful manner and her allegations are not true.

18 13. The Board noted its review of the interview with FB and others shows that her
19 story seems very credible and that she did not file the complaint with the Board, but with her
20 insurance company who forwarded her complaint to the Board. The Board noted Respondent
21 lacked credibility – FB supposedly had a history of melanoma and Respondent seems to
22 understand the treatment for melanoma, but when it was brought up there was absolutely no note
23 anywhere except on one page and there is nothing else in subsequent visits until the date in
24 question; Respondent did not document his phone conversation with FB; Respondent calling FB
25

1 to come back on a semi-urgent basis, but not telling her the issue; and the late entries in the
2 chart.

3 14. The standard of care required Respondent to make an appropriate referral of
4 suspected melanoma to the appropriate specialist.

5 15. Respondent deviated from the standard of care because he did not make an
6 appropriate referral of suspected melanoma.

7 16. FB was not referred for evaluation and treatment of suspected melanoma.

8 CONCLUSIONS OF LAW

9 1. The Arizona Medical Board possesses jurisdiction over the subject matter hereof
10 and over Respondent.

11 2. The Board has received substantial evidence supporting the Findings of Fact
12 described above and said findings constitute unprofessional conduct or other grounds for the
13 Board to take disciplinary action.

14 3. The conduct and circumstances described above constitutes unprofessional
15 conduct pursuant to A.R.S. § 32-1401(27)(q) ("[a]ny conduct or practice which is or might be
16 harmful or dangerous to the health of the patient or the public;) A.R.S. § 32-1401(27)(t)
17 [k]knowingly making any false or fraudulent statement, written or oral, in connection with the
18 practice of medicine;") A.R.S. § 32-1401(27)(z) ("[e]ngaging in sexual contact with a current
19 patient or with a former patient within six months after the last medical consultation 'Sexual
20 Conduct' includes: (ii) [m]aking sexual advances, requesting sexual favors or engaging in other
21 verbal conduct or physical contact of a sexual nature.")

22 ORDER

23 Based upon the foregoing Findings of Fact and Conclusions of Law,

24 IT IS HEREBY ORDERED:
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1 1. Respondent is issued a Letter of Reprimand for failure to appropriately refer a
2 patient with suspected melanoma, for inappropriate contact with a patient, and for making false
3 statements in FB's records.

4 2. Respondent is placed on probation for five years with the following terms and
5 conditions:

6 a. All of Respondent's interactions with female patients must take place in the
7 presence of another female licensed healthcare provider who has an unencumbered view of the
8 patients. The licensed healthcare provider must be present in all settings including, but not
9 limited to, office, hospital and clinic. The licensed healthcare provider must be employed by the
10 Respondent, hospital or clinic and may not be a representative or relative who accompanies the
11 patient. Respondent shall instruct the licensed healthcare professional to document her
12 presence by signing, dating and legibly printing his/her name on each patient's chart **at the time**
13 **of the examination.** Respondent shall instruct the licensed healthcare provider to immediately
14 report any inappropriate behavior to Respondent and the Board. Board Staff may perform
15 random periodic chart reviews to ensure compliance with this Order.

16 b. Respondent shall immediately obtain a treating therapist approved by Board Staff
17 and remain in treatment with the therapist for boundary issues and psychosocial issues for a
18 minimum of twenty-four months. Respondent shall comply with the therapist's recommendations
19 for continuing care and treatment. Respondent shall instruct the therapist to submit quarterly
20 written reports to the Board regarding continued care and treatment. The reports must be
21 submitted on or before the 15th day of March, June, September and December of each year.
22 Respondent shall provide the therapist with a copy of this Order. Respondent shall pay the
23 expenses of therapy and shall pay for the preparation of the quarterly reports. After twenty-four
24 months Respondent may submit a written request that the Board terminate the requirement that
25 Respondent remain in treatment with the therapist. The Board's decision to terminate will be

1 based, in part, upon the treating therapist's recommendation for continued care and treatment.
2 The Board may require any additional testing or evaluation necessary for it to determine whether
3 to terminate the therapy requirement.

4 c. Within six months of the effective date of this Order Respondent shall obtain 15
5 hours of Board Staff pre-approved Category I Continuing Medical Education ("CME") in medical
6 records. Respondent shall provide Board Staff with satisfactory proof of attendance. The CME
7 hours shall be in addition to the hours required for biennial renewal of medical license.

8 d. Respondent shall obey all federal, state, and local laws and all rules governing the
9 practice of medicine in Arizona.

10 3. In the event Respondent should leave Arizona to reside or practice outside the
11 State or for any reason should Respondent stop practicing medicine in Arizona, Respondent shall
12 notify the Executive Director in writing within ten days of departure and return or the dates of non-
13 practice within Arizona. Non-practice is defined as any period of time exceeding thirty days during
14 which Respondent is not engaging in the practice of medicine. Periods of temporary or permanent
15 residence or practice outside Arizona or of non-practice within Arizona, will not apply to the
16 reduction of the probationary period.

17 **RIGHT TO PETITION FOR REHEARING OR REVIEW**

18 Respondent is hereby notified that he has the right to petition for a rehearing or review.
19 The petition for rehearing or review must be filed with the Board's Executive Director within thirty
20 (30) days after service of this Order. A.R.S. § 41-1092.09(B). The petition for rehearing or review
21 must set forth legally sufficient reasons for granting a rehearing or review. A.A.C. R4-16-102.
22 Service of this order is effective five (5) days after date of mailing. A.R.S. § 41-1092.09(C). If a
23 petition for rehearing or review is not filed, the Board's Order becomes effective thirty-five (35)
24 days after it is mailed to Respondent.
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Respondent is further notified that the filing of a motion for rehearing or review is required to preserve any rights of appeal to the Superior Court.

DATED this 12th day of October, 2006.



THE ARIZONA MEDICAL BOARD

By *Timothy C. Miller*
TIMOTHY C. MILLER, J.D.
Executive Director

ORIGINAL of the foregoing filed this 13th day of October, 2006 with:

Arizona Medical Board
9545 East Doubletree Ranch Road
Scottsdale, Arizona 85258

Executed copy of the foregoing
mailed by U.S. Mail this 13th day of October, 2006, to:

Gordon Lewis
Jennings, Strouss & Salmon, PLC
The Collier Center - 11th Floor
201 East Washington Street
Phoenix, Arizona 85004-2385

Zev Fainsilber, M.D.
Address of Record

Zev Fainsilber

1 **BEFORE THE ARIZONA MEDICAL BOARD**

2 In the Matter of

3 **Case No. MD-03-0014A**

4 **ZEY FAINSILBER, M.D.**

5 Holder of License No. **22634**
6 For the Practice of Allopathic Medicine
In the State of Arizona.

ORDER DENYING REHEARING

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8 At its public meeting on December 7, 2006 the Arizona Medical Board ("Board")
9 considered a Motion for Rehearing filed by Zey Fainsilber, M.D. ("Respondent"). Respondent
10 requested the Board rehear its October 13, 2006 Findings of Fact, Conclusions of Law and
11 Order for a Letter of Reprimand and Probation. Upon due consideration of the facts and law
12 applicable to this matter, the Board voted to deny the Respondent's Motion for Rehearing.

13 **ORDER**

14 IT IS HEREBY ORDERED that:

15 Respondent's Motion for Rehearing is denied. The Board's October 13, 2006, Findings
16 of Fact, Conclusions of Law and Order for a Letter of Reprimand and Probation is now effective
17 and constitutes the Board's final administrative order.

18 **RIGHT TO APPEAL TO SUPERIOR COURT**

19 Respondent is hereby notified that he has exhausted his administrative remedies.
20 Respondent is advised that an appeal to Superior Court in Maricopa County may be taken from
21 this decision pursuant to title 12, chapter 7, article 6.
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1 DATED this 12th day of December, 2006.



ARIZONA MEDICAL BOARD

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By 
TIMOTHY E. MILLER, J.D.
Executive Director

ORIGINAL of the foregoing filed this
13th day of December, 2006 with:

The Arizona Medical Board
9545 East Doubletree Ranch Road
Scottsdale, Arizona 85258

Executed copy of the foregoing
mailed by US MAIL this 13th day of
December, 2006 to:

Jay. A. Fradkin
Jennings Strouss & Salmon, PLC
201 E. Washington St.
Phoenix, Arizona 85004

Zev Fainsilber, M.D.
Address of Record

